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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

BRIEF AMICI CURIAE ON BEHALF OF CONGRESSMAN LOUIS STOKES (OH), CONGRESSMAN ALAN WHEAT (MO), CONGRESSMAN MIKE ESPY (MS), CONGRESSMAN CRAIG A. WASHINGTON (TX), WILLIE L. BROWN, SPEAKER OF THE CALIFORNIA ASSEMBLY, DANIEL T. BLUE, JR., SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, LOIS DeBERRY, SPEAKER PRO TEMPORE OF THE TENNESSEE HOUSE OF REPRESENTATIVES, LARRY E. TRUJILLO, SR., MINORITY LEADER OF THE COLORADO SENATE, STATE SENATOR ALBERT R. WYNN (MD), STATE SENATOR HARDY WILLIAMS (PA) IN SUPPORT OF THE APPELLEES

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INTERESTS OF AMICI CURIAE

The *amici* consist of Members of Congress and state legislators who are members of a class of citizens protected by the Voting Rights Act, 42 U.S.C. § 1973. The *amici* are intended beneficiaries of the Voting Rights Act and have a strong interest in the issues presented in this case. The *amici* seek to ensure that the Act is not weakened or employed to limit the political power of minority voters.

The Voting Rights Act has enhanced the opportunity for minority citizens to fully participate in the political process and elect representatives of their choice. Since the passage of the Act, the number of African-American and Hispanic elected officials in the United States has increased dramatically to more than 11,000. *See* National Association of Latino Elected And Appointed Officials, *National Roster of Hispanic Elected Officials* (1991); Joint Center for Political and Economic Studies, *Black Elected Officials, A National Roster* (1991).

The *amici* do not agree with the United States *amicus* that the protection of the Voting Rights Act is only available to minority citizens who satisfy the three preconditions established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Such an approach would severely weaken the scope of the Act. The standard outlined in *Gingles* was not designed to resolve the type of vote dilution claim presently before this Court, a single-member district packing claim. Nevertheless, judicially manageable standards do exist to measure appellees' vote dilution claim and the *amici* propose such a standard.

A jurisdiction does not satisfy the requirements of the Act by simply maximizing the number of "majority minority" districts while dispersing the remaining minority population into overwhelmingly white districts. The Act was intended to be inclusive and provide for the development of bi-racial coalitions, not to limit the electoral in-

fluence of minority voters by packing them into a minimum number of districts.

The *amici*, in their official positions, have sought to foster bi-racial or multi-racial coalitions in both the legislative chambers and their own districts. The development of these coalitions is the essence of American democracy. Maximizing majority minority districts by politically segregating minority voters would destroy these coalitions and reduce the electoral power of minority voters.

The *amici* urge this Court to affirm the decision of the district court. An affirmation would preclude future efforts to limit minority voting strength by packing minority voters into a minimum number of districts.

Pursuant to Rule 37 of the Supreme Court of the United States, written consent of all the parties was requested. Appellants and appellees have granted their consent to the filing of this brief as *amici curiae*.

STATEMENT OF THE CASE

In the interests of brevity, the *amici* adopt the statement of the case set forth in the brief of the *Quilter* appellees.

SUMMARY OF ARGUMENT

1. The district court properly found that the Ohio Apportionment Board diluted the voting strength of African-American voters by increasing the African-American percentage in districts presently electing African-American representatives and invariably reducing the African-American percentage in the neighboring districts. A jurisdiction may not increase the minority population of a district which regularly elects the representative of choice of the minority community, unless necessary to continue to provide the minority community with such an opportunity. Any unnecessary increase, coupled with a corresponding decrease of minority popu-

lation in a neighboring district to a level insufficient to provide an opportunity to elect a representative of choice, dilutes minority voting strength. In addition, judicially manageable standards exist to measure appellees' vote dilution claim.

2. The preconditions established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), were limited to challenges to multimember districts and not applicable to appellees' § 2 claim, a single-member district packing claim. The application of the *Gingles* preconditions to all § 2 claims would severely limit the scope of the Voting Rights Act and would be inconsistent with congressional intent. Nothing in the Act or accompanying legislative history indicates that minority voters must reach a certain numerical level to receive its protection. An electoral system can still have a discriminatory effect even if minority voters cannot comprise a majority in a single-member district.

3. The Voting Rights Act was not intended to result in the political segregation of minority voters into a few districts, limiting their electoral influence, unless absolutely necessary to ensure the minority community an opportunity to participate in the political process and elect representatives of their choice. Under the guise of protecting minority voting rights, the Ohio Apportionment Board ignored the existence of coalitional voting and sought to limit the electoral strength of minority voters for solely partisan purposes by maximizing the number of majority minority districts while dispersing the remaining minority population into overwhelmingly white districts. The district court properly held that the Board's intent to pack and fragment African-American voters violated § 2 of the Voting Rights Act and the Fifteenth Amendment.

ARGUMENT

I. THE MINORITY POPULATION OF A DISTRICT THAT REGULARLY ELECTS A MINORITY REPRESENTATIVE MAY NOT BE INCREASED UNLESS NECESSARY TO CONTINUE TO PROVIDE THE MINORITY COMMUNITY AN OPPORTUNITY TO ELECT A REPRESENTATIVE OF THEIR CHOICE.

The district court found that the Ohio Apportionment Board diluted the voting strength of African-American voters by increasing the African-American percentage in districts presently electing African-American representatives and invariably reducing the African-American percentage in the surrounding districts absent any justification. J.S. App. 130a. The district court's decision was not clearly erroneous and its decision should be affirmed.[1]

A jurisdiction may not increase the minority population of a district which regularly elects the representative of choice of the minority community, unless necessary to continue to provide the minority community with such an opportunity. Any unnecessary increase, coupled with a corresponding decrease of minority population in a neighboring district to a level insufficient to provide an opportunity to elect a representative of choice[2] in the neighboring district dilutes minority voting strength.

---

[1] In *Thornburg v. Gingles*, 478 U.S. 30, ..) the Court determined that the clearly erroneous test of Fed. R. Civ. P. 52(a) "is the appropriate standard for appellate review of a finding of vote dilution."

[2] A candidate of choice of the minority community is not necessarily of any particular racial or ethnic origin. In *Armour*, 775 F. Supp. 1044 (N.D. Ohio, 1991), the district court declared that "the defendants misapprehend the requirements of the Voting Rights Act. The issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a *candidate of choice* . . . we find that plaintiffs could elect a candidate of their choice, although not necessarily of their race, in a reconfigured district." *Id.* 775 F. Supp. at 1059-1060 (emphasis in original).

A. Minority Vote Dilution May Result From The Overconcentration or Packing of Minority Voters.

The minority vote dilution found by the district court resulted from the packing (or overconcentration) of African-American voters into several districts.[3] Packing African-American voters into one or a few districts in numbers beyond the proportion needed to exercise effective political control of the district "wastes" African-American votes that could be used to control or influence elections in other districts. Although African-American voters "within each concentrated district have an obviously strong opportunity to elect representatives of their choice . . . , the adverse results may be identifiable in terms of what might otherwise have occurred elsewhere." *Rybicki v. State Board of Elections of Illinois*, 574 F. Supp. 1147, 1152 (N.D. Ill. 1983). The Ohio Apportionment Board packed minority voters into a minimum number of districts, "wasting" minority votes that could have a significant impact in neighboring districts. J.S. App. 7a-8a.

There is no set percentage at which minorities can be said to be unlawfully packed. An appraisal of local factors must be conducted to determine the percentage necessary to provide minority voters an opportunity to elect candidates of choice and a determination made whether the percentages in the districts in question exceed this figure.[4] A review of the local factors conducted by the district court in Ohio indicated the low threshold necessary to provide African-American voters an oppor-

[3] Packing is the overconcentration of minority voters into a district to prevent them from having a majority or significant influence in adjoining districts. Parker, *Black Votes Count*, p. 51 (1990).

[4] This approach is consistent with the intent of the Senate Report to require a fact intensive test and a "searching practical evaluation of the past and present reality" for § 2 violations. S. Rep. No. 417, 97th Cong., 2d Sess. 28 (hereinafter "S. Rep."), *reprinted in*, 1982 U.S.C.C.A.N. 177.

tunity to elect candidates of their choice.[5] Other courts have recognized the fact-specific nature of the inquiry in vote dilution claims. *See Rybicki*, 574 F. Supp. at 1152 (court rejected packing claim on grounds that high percentage of minority voters was necessary to compensate for the low minority turnout); *Latino Political Action Committee v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986) (court found racially polarized voting necessitated "packed" districts).

In *Latino Political Action Committee*, the First Circuit rejected a packing claim following a jurisdiction-specific analysis of the voting patterns of minorities and whites in Boston. The court noted that "a degree of 'packing' is necessary, where polarized voting exists, to account for the fact that say, Black or minority voters do not vote as completely cohesive blocs. In fact, the *less* cohesive the bloc, the *more* 'packing' needed to assure, say a Black representative (though, of course, the less polarized the voting, the less the need to seek that assurance)." *Id.* 784 F.2d at 414 (emphasis in original).

The most important condition affecting the minority percentage that may be considered packed is the degree of racial bloc voting. There is no need to create districts with high concentrations of minorities if there is little or no significant racial bloc voting in a jurisdiction. In *Latino Political Action Committee*, the court found a moderate degree of racially polarized voting and a minority population that did not necessarily vote as a bloc, hence concluding that the 82% African-American district was not "packed." *Id.*

On the other hand, the district court in Ohio found little, if any, evidence of polarized voting. J.S. App. 133a. Instead, the court found widespread coalition voting. J.S. App. 141a. Furthermore, African-Americans were turning out at rates comparable to whites. For these two

[5] All state legislative districts, in Ohio, over 35% African-American presently elect an African-American to office. J.S. App. 141a.

reasons, the percentage African-American needed to constitute packing is far lower than in either the *Rybicki* case or the *Latino Political Action Committee* case. The fact that all districts with African-American populations of 35% or greater elected African-Americans to office is also a clear indication that districts with far greater percentages of African-Americans would constitute packing.

Based on a review of local factors in Ohio, the court properly found that the Ohio Apportionment Board unlawfully packed African-American voters. J.S. App. 141a. The lack of legally significant racial bloc voting, high turnout rates of African-Americans, and the extensive degree of coalitional voting between African-Americans and whites are all factors supportive of appellees' packing claim.

B. A Judicially Manageable Standard Exists to Measure Appellees' Vote Dilution Claim and the District Court Properly Concluded That the Apportionment Board's Plan Diluted Minority Voting Strength.

In 1982, Congress amended § 2 of the Voting Rights Act, 42 U.S.C. § 1973(2), to restore the legal standard that governed voting discrimination cases prior to this Court's plurality opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980). S. Rep. at 27, 1982 U.S.C.C.A.N. at 205. To establish a § 2 violation under *Bolden*, minority voters had to prove discriminatory intent. *Bolden*, 446 U.S. at 66. The 1982 amendments establish that a violation of § 2 can be proved by showing that a challenged electoral system or practice has a discriminatory effect on minority voters. The Senate Report accompanying the amendments established as the relevant legal standard the "results test," applied in *White v. Regester*, 412 U.S. 755 (1973), and also elaborated on the circumstances that might be probative of a § 2 violation.[6] These factors are derived from the

[6] Typical factors include:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members

analytical framework used by this Court in *White*, *supra*, as articulated by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir., 1973), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (*per curiam*). S. Rep. at 28 n. 113, 1982 U.S.C.C.A.N. at 207 n. 113.

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of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"whether there is significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

"While these enumerated factors will also be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

"The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."

S. Rep. at 28-29, 1982 U.S.C.C.A.N. at 206-207.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), a majority of this Court determined that "(w)hile many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in *multimember* districts," three preconditions are necessary to prove that the "multimember districts operate to impair minority voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 48 (emphasis added):

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters inability to elect its candidates . . . Second, the minority group must be able to show that it is politically cohesive . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Id. 478 U.S. at 50-51 (emphasis in original).

The majority of the Gingles Court expressly limited the application of these preconditions to a claim challenging the use of multimember districts and reserved judgment on its application to other types of vote dilution claims:

> We have no occasion to consider whether § 2 permits, and if it does what standards should pertain to, a claim brought by a minority group, which is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claim

> that multimember districts operate to dilute the vote of geographically cohesive minority groups, which are large enough to constitute majorities in single-member districts and which are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Id. 478 U.S. at 47-48 n. 12 (emphasis in original).

The standard outlined by this Court in *Gingles* was not designed to resolve the type of vote dilution claim presently before this Court. The claim in *Gingles* was one of minority submergence in multimember districts. In this particular instance, the claim is of unlawful packing of minority voters in single-member districts. The three preconditions outlined in *Gingles* are not applicable to single-member packing claims. Nevertheless, judicially manageable standards do exist to measure appellees' vote dilution claim.

In a packing claim, the initial inquiry is the minority percentage necessary to elect the representative of choice of the minority community. If the minority population percentage exceeds this figure, and it is possible, by reducing this percentage, to provide the minority community an opportunity to influence elections in neighboring districts, then a packing claim has been established.

The factors most important to establishing the percentage necessary to provide minority voters an opportunity to elect candidates of choice are the degree of minority cohesiveness, the extent of white crossover voting, and the turnout rates of minorities relative to whites. If the minority percentage in a district exceeds the necessary figure, then a court must determine whether reducing this percentage would give minorities an opportunity to in-

fluence elections elsewhere.[7] As Justice O'Connor noted in *Gingles*, the "power to influence the political process is not limited to winning elections." *Gingles*, 478 U.S. at 99 (O'Connor, J. concurring).

One measure of influence, as recognized by the district court, requires an analysis of the degree of minority support received by an elected representative and the responsiveness of that representative to minority interests as reflected in the representative's voting record on issues of importance to the minority community. J.S. App. 13a. Vote dilution is present if minority voters are overconcentrated in one district to the extent that the minority community is unable to elect a responsive representative in neighboring districts.

The district court found that the Ohio Apportionment Board created minority districts in excess of the African-American population percentage necessary to elect candidates of choice without valid justification. J.S. App. 141a. As a result of the overconcentration of minority voters in several districts, the African-American community is denied the opportunity to continue to elect responsive representatives in the neighboring districts.

II. THE THREE PRECONDITIONS ESTABLISHED BY THIS COURT IN *THORNBURG v. GINGLES* WERE LIMITED TO CHALLENGES TO MULTIMEMBER DISTRICTS AND THE DISTRICT COURT PROPERLY HELD THAT THESE PRECONDITIONS WERE NOT APPLICABLE TO APPELLEES' SECTION 2 CLAIM.

The United States as *amicus* argues that, despite the clear and unambiguous language in the *Gingles* opinion limiting the three preconditions to a challenge to multimember districts, these preconditions apply to all vote

[7] It may not be possible to decrease the minority percentage in a district if the minority population is highly residentially segregated. *See Rybicki*, 574 F. Supp. at 1152.

dilution claims under § 2. United States *amicus brief* at 14. The United States then argues that "given that legally significant racial bloc voting was not shown in Ohio to have prevented black voters from electing representatives of their choice . . . appellees simply cannot succeed on their claim that the 1992 plan results in dilution of black voting power in violation of Section 2 . . ." *Id.* at 15. In addition, the United States attacks the district court for holding that minority voters need not comprise a majority in a single-member district to prevail. *Id.*

The position of the United States is inconsistent with the legislative history of Section 2 and precedent of this Court. Moreover, the ability of minority voters to seek relief under the Voting Rights Act would be severely curtailed under the approach proposed by United States *amicus*.

A. The Application of the *Gingles* Preconditions to All Section 2 Claims Would Severely Limit the Scope of the Voting Rights Act and Would Be Inconsistent With Congressional Intent.

The intent of the 1982 amendments to § 2 was to ensure that minority voters have equal access to the political process. S. Rep. at 27, 1982 U.S.C.A.A.N. at 205.* Nothing in § 2 of the Voting Rights Act or its accompanying legislative history indicates that minority voters must reach a certain numerical level to receive its protection. To the contrary, the Act was designed to

* Section 2(b) provides in part:

"(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice . . ." 42 U.S.C. § 1973 (2) (b).

protect individual voters and not simply groups of voters of a sufficient size. Section 2 seeks to protect against the "denial or abridgement of the right of any *citizen* of the United States to vote on account of race or color . . ." 42 U.S.C. § 1973(2)(a) (emphasis added).

The position of the United States would deny members of a protected class unable to comprise a majority in a single-member district the protection of the Act. A redistricting plan can have a discriminatory effect on minority voters even if those voters are not sufficient in number to control the outcome of an election. This Court has acknowledged "any abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to *influence* the outcome of an election." *Chisom v. Roemer*, 111 S.Ct. 2354, 2365 (1991) (emphasis in original).

Moreover, as this Court has repeatedly noted, discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups are an impermissible denial of the right to have one's vote fully count just as much as an outright denial of access to the ballot box. *See Fortsen v. Dorsey*, 379 U.S. 433, 439 (1965). This Court has not limited the protection of the Voting Rights Act to minority citizens who can comprise a majority in a single-member district.

The argument of the United States that appellees cannot succeed without showing legally significant racially polarized voting ignores the intent of the Voting Rights Act and reveals the inapplicability of the *Gingles* preconditions to all types of § 2 claims. The district court agreed with the appellees' claim that the Ohio Apportionment Board, without justification, overconcentrated the African-American population into a few districts where African-Americans were already able to elect candidates of their choice. J.S. App. 7a-8a. The remaining African-American voters were fragmented among dis-

tricts where they would be unable to influence the outcome of an election. *Id.* In Ohio, African-American legislators have been consistently elected from districts with far less than an African-American majority due to the absence of significant racial bloc voting and the existence of coalitional voting between African-Americans and whites. J.S. App. 132a-133a.

The United States contends that if a jurisdiction experiences consistent electoral success of minority candidates in majority white districts, with the support of minority voters, minority voters can never succeed on a § 2 claim. United States, *amicus* at 15. The United States would apparently have no objection to jurisdictions creating districts that are 100% minority ("packing" minority voters) or no districts where minority voters could elect candidates of their choice ("fracturing") if the jurisdiction did not experience legally significant racially polarized voting. The United States is suggesting the elevation of one factor rather than an examination of the totality of circumstances as required in *White*, 412 U.S. at 413, and the Senate Report, S. Rep. at 29, 1982 U.S.C.C.A.N. at 207.

The United States seems to be proposing a return to the *Mobile v. Bolden*, 446 U.S. 55 (1980) standard. If the three preconditions of Gingles are not satisfied, then minority voters could not rely upon the discriminatory results test of § 2 and would instead need to establish discriminatory intent (either under the Voting Rights Act or the Fourteenth or Fifteenth Amendments). *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied* 111 S. Ct. 681 (1991); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Minority citizens would have no recourse under the Voting Rights Act if the discrimination against a protected class was borne not of racial, but of political, animus, although resulting in racially discriminatory effects. *See Davis v. Bandemer*, 478 U.S. 109 (1986).

B. This Court Has Recognized That the *Gingles* Preconditions Are Not Applicable to All Types of Vote Dilution Claims.

This Court has previously recognized that the *Gingles* preconditions are not applicable to all § 2 claims. *See Chisom*, 111 S. Ct. at 2368. In *Chisom*, the Court was asked to determine whether judicial elections are covered under § 2. The Louisiana Supreme Court consists of seven members, two of whom are elected at-large from one multimember district and the remainder elected from single-member districts. The Fifth Circuit Court of Appeals, sitting *en banc*, held that the Congress' use of the word "representative" in the phrase to "elect representatives of their choice" in § 2(b) of the Act indicated that Congress did not intend to authorize vote dilution claims in judicial elections. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (1990). Louisiana and a majority of the Fifth Circuit also suggested that no judicially manageable standards existed for fashioning relief for vote dilution claims challenging judicial elections. *Chisom*, 111 S. Ct. at 2368.

Since the "one person, one vote" requirement does not apply to judicial elections, the first prong of *Gingles* cannot be used as a standard.[9] However, this Court refused to adopt the position now offered by the United States and held that state judicial elections are "included within the ambit of § 2 as amended." *Chisom*, 111 S. Ct. at 2368. The Court rejected the argument that the failure to apply the principle of one person, one vote to judicial elections made these elections totally immune from vote dilution claims:

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[9] *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D.La. 1972), *aff'd.* 409 U.S. 1095 (1973) ("Judges do not represent people they serve people. Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary").

> The standard that should be applied in litigation under § 2 is not at issue here. Even if serious problems lie ahead in applying the totality of circumstances described in section 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

Id.

Lower courts have been divided on the applicability of the *Gingles* preconditions to challenges to single-member districts. Several courts have applied these preconditions to § 2 challenges to single-member districts.[10] Other courts have concluded that the preconditions are not necessarily applicable to all § 2 claims.[11] Still other courts have reluctantly applied the preconditions due to earlier decisions.[12]

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[10] *Hastert v. State Board of Elections*, 777 F. Supp. 634, 651-655 (N.D. Ill. 1991); *Illinois Legislative Redistricting Commission v. LaPaille*, 792 F. Supp. 1110 (N.D. Ill. 1991); *Jeffers v. Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 591 (E.D. Va. 1988); *Neal v. Coleburn*, 689 F. Supp. 1426, 1434-1435 (E.D. Va. 1988).

[11] *Armour v. Ohio*, 775 F. Supp. at 1052 ("based on . . . statements in *Chisom* and the Court's express disclaimers regarding the scope of its decision in *Gingles*, we cannot conclude that the Court intended the *Gingles* preconditions for challenges to multi-member districting schemes to apply to all § 2 claims"); *Garza v. County of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) ("to the extent *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength"); *See also Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D.Pa. August 13, 1992); *West v. Clinton*, 786 F. Supp. 803 (W.D. Ark. 1992).

[12] *See Turner v. State of Arkansas*, 784 F. Supp. 553, 567-571 (E.D. Ark. 1991), *aff'd*, 112 S.Ct. 2296 (1992) ("the Court is inclined to agree with the plaintiffs . . . that all of the *Gingles* court-created preconditions might not be required in every conceivable redistricting challenge under Section 2 . . . Nevertheless the facts of this case, precedent, and especially *Jeffers*, require adherence to such preconditions here").

The *Gingles* Court was also sharply divided over these preconditions. Justice O'Connor, in a concurring opinion, joined by three Justices, argued that the use of these preconditions disregarded the balance struck by Congress in amending § 2 between allowing vote dilution claims to be brought under § 2 and avoiding a right to proportional representation for minority voters. Justice O'Connor argued that the majority ignored "most of the *Zimmer* factors that were developed by the Fifth Circuit to implement *White's* results test and which were highlighted in the Senate Report," and that the majority's test for vote dilution "amounts to a right to usual, roughly proportional, representation on the part of sizable, compact, cohesive minority groups" inconsistent with the requirements of the Act. *Gingles*, 478 U.S. at 91-92 (O'Connor, J., concurring).

The electoral system at issue in *Chisom* was a combination of single-member and multimember districts. Yet this Court declined to reject a vote dilution claim for lack of judicially manageable standards when the *Gingles* preconditions clearly do not apply. The *amici* request that the Court, consistent with its decision in *Chisom*, reject the view of the United States that the *Gingles* preconditions apply to all claims that the drawing of single-member districts results in dilution of minority votes.

Assuming the *Gingles* test is a proper measure of vote dilution when minority voters challenge the use of multimember districts (and can comprise a majority in a single-member district) there is no basis in the Act, legislative history or precedent of this Court to apply this test to all vote dilution claims. The application of the *Gingles* preconditions to appellees' dilution claim based on "packing" would severely limit the breadth of the Act, an Act this Court has acknowledged to be a "broadly worded statute." *Chisom*, 111 S. Ct. at 2368.

III. THE VOTING RIGHTS ACT WAS NOT INTENDED TO LEAD TO THE POLITICAL SEGREGATION OF MINORITY VOTERS BY CREATING A FEW MAJORITY MINORITY DISTRICTS AND NEGATING ANY MINORITY INFLUENCE IN SURROUNDING DISTRICTS.

The approach of the Ohio Apportionment Board and recent redistricting developments in other states have led to concerns over the interpretation of the Voting Rights Act. Representative John Lewis (GA), a veteran of the civil rights movement and the only African-American Member of Congress from Georgia, has expressed doubts about the benefits to minorities of the federal courts' and United States Department of Justice's insistence on the creation of majority minority districts wherever possible.[13] According to Representative Lewis, "it looks too much like South Africa. It seems like we're creating little black townships." *USA Today*, May 11, 1992 at 2A.

Representative Lewis expressed two concerns. First, tortuously drawn districts that snake through areas with high concentrations of minorities have no sense of shared interests and no geographical balance. "You have to draw lines where people have a community of interest. You shouldn't just put people together because they are the same color." *Id.* Second, other districts—the vast majority—are sapped of their minority voting strength, leaving elected officials in these districts with little reason to represent minority viewpoints. "The whole intent of the civil

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[13] *See* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley (Dec. 18, 1991) (refusing to preclear North Carolina's congressional redistricting plan under § 5 of the Voting Rights Act for failing to create a second majority minority district); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Mark H. Cohen (Jan. 21, 1992) (objecting to Georgia's congressional redistricting plan for failure to create a third majority African-American district); *See also DeGrandy v. Wetherell*, Slip op. 92-40015-WS (N.D. Fla. May 29, 1992).

rights movement was to create a truly interracial society. My goal is interracial democracy." *Id.*

Other observers have made similar points on the recent efforts to maximize the number of majority minority districts:

> More fundamentally, these developments raise the question whether some voting rights suits and remedies now being pursued around the country may—in the long run—do more harm than good, by spurring politicians to appeal only to members of their own race, and by putting the law's imprimatur on the notion that it's only natural to vote along racial lines.
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> * * * *
>
> Are voting rights suits entrenching separate-but-equal elections as a permanent feature of the American landscape? Are they institutionalizing the kind of racially polarized politics we should be trying to get away from? Might they leave minorities and their representatives isolated?
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> * * * *
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> Almost every step that has been taken down this road has a certain logic. But with each new step—with almost no public debate—we seem to be perpetuating racial divisions by carving a principle of racial separation into our electoral system.
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> * * * *
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> The net long-term effect of creating as many black—and Hispanic—majority voting districts as possible could be to reduce black and Hispanic voters' influence over policy makers generally by leaving many white officeholders with little incentive to court them.

Turner, 784 F. Supp. at 560 (*quoting*, Taylor, "Voting By Race," *American Lawyer*, June 1991, at p. 50, 51)

The district court correctly held that the Voting Rights Act does not mandate a "per se requirement to create majority minority districts wherever possible." J.S. App.

8a. Such a requirement is inconsistent with the intent of the Act and legislative history. J.S. App. 10a-11a. The creation of such districts are only required when they are necessary to provide a protected class of voters an equal opportunity to participate in the political process and to elect candidates of their choice. *See, United Jewish Organizations v. Carey*, 430 U.S. 144, 164-166 (1977) (supermajority minority districts necessary to provide minority voters an opportunity to elect a representative of their choice due to low minority registration and turnout and significant racially polarized voting). By unnecessarily maximizing the number of majority minority districts, the plan drawn by the Ohio Apportionment Board has the effect of diluting the voting strength of African-American voters by limiting their electoral influence in the surrounding districts. J.S. App. 7a-8a.

The Voting Rights Act does not require jurisdictions to maximize the number of majority-minority districts. Although there is significant dispute concerning what constitutes undiluted minority voting strength, "there is substantial doubt that Congress intended undiluted minority voting strength to mean maximum feasible minority voting strength." *Gingles*, 478 U.S. at 94. (O'Connor, J. concurring). Justice O'Connor questioned the wisdom of the Court's approach in *Gingles*, noting that "requiring . . . every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts." *Id.* 478 U.S. at 97 (O'Connor, J. concurring). Such an approach could conceivably lead to political segregation based on race and ethnicity. Minority voters would be assigned, and their voting strength limited, to just those districts where a majority minority district could be created.

The intent of the Voting Rights Act is not to politically segregate minority voters. A jurisdiction is not free to

create majority minority districts wherever possible if it is not necessary to provide minority voters an equal opportunity to participate in the political process and to elect representatives of their choice. In the absence of limits placed on a jurisdiction's discretion, our political system could resemble an American version of apartheid.

A jurisdiction should not be permitted to develop ingenious methods to limit the political power of minority voters by segregating them into a limited number of districts. In *Turner*, the Arkansas legislature adopted a congressional plan that provided African-American voters significant influence in three congressional districts (with African-American populations of 17.9%, 17.6% and 26.6%). Plaintiffs and the Arkansas Republican Party sought the creation of one district containing as high an African-American population as possible (42%) while leaving African-American voters with negligible influence in the remaining three districts.

The court, in rejecting the claim, questioned the motivation of the Arkansas Republican Party in identifying itself with the interests of the African-American plaintiffs in recommending one congressional district with a 42% African-American population:

> The unspoken assumption is that the Republicans in the proposed Fourth District will sacrifice their own political interest (wresting this seat from Democratic control) in favor of the larger objective of the Republican Party, i.e. to gain strength in the other two implicated congressional districts.

Turner, 783 F. Supp. at 563. The court reasoned that granting plaintiffs relief would not necessarily be in the best interests of the African-American community. Under the plan passed, African-American voters will exhibit influence in three congressional districts. However, under the Republican plan African-American voters would only be able to influence one, or possibly two, districts. *Id.* 784 F. Supp. at 571.

Like the Republicans in Arkansas, the Ohio Apportionment Board sought to limit the electoral strength of minority voters. Under the guise of protecting minority voting rights, the Board ignored the existence of coalitional voting and limited the political influence of minority voters for solely partisan purposes by maximizing the number of majority minority districts while dispersing the remaining minority population into overwhelmingly white districts. J.S. App. 7a. The Board intended to fracture and pack minority voters. J.S. App. 141a-143a. Although the protection of incumbents or the creation of districts to enhance a political parties opportunities is permissible, it may not be accomplished at the expense of minority voting potential. *Garza*, 918 F.2d at 771; *See also* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to John E. Pilcher (May 1, 1992) (denying preclearance to the 1992 redistricting plan for the board of education in Dallas County, Al.).

Nevertheless, it is important that minority voters who evidence a community of interest, geographic compactness and political cohesiveness are afforded an opportunity to elect their preferred representatives. There are many situations when it is necessary to create majority minority districts, for example, to compensate for legally significant racially polarized voting. However, the creation of such districts should not be used as an excuse to limit the electoral strength of minority voters.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

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